Supreme Court, U.S.
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No. 02-1292

In the

Supreme Court of the United States

NEMESIS VERITAS, L. P., FKA MCMAHAN & COMPANY and D. BRUCE MCMAHAN,

Petitioners,

v.

WILLIAM A. TOTO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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RESTATEMENT OF THE ISSUE

Respondent submits that the following more accurately and succinctly reflects the question presented by Petitioners:

Is a federal court, which is sitting in diversity jurisdiction and pledged by federal law to follow the substantive law of the forum state, required by federal law to follow a choice of law analysis when to do so would be contrary to the substantive law of the forum state?

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REASONS FOR DENYING THE WRIT

1.

In this diversity action, the Eleventh Circuit correctly followed the law of the forum state and decided, as a result, that Florida's Offer of Judgment Statute applied, despite the fact that Virginia law governed the cause of action.

(a) The Decision in *BDO Seidman*:

On October 31, 2001, the Fourth District Court of Appeal became the first Florida appellate court to decide the issue of whether Florida's Offer of Judgment Statute, Fla. Stat. § 768.79, applied in Florida cases where the law of another state governed the cause of action. *BDO Seidman v. British Car Auctions*, 802 So.2d 366, 369 (Fla. 4th DCA 2001). Judge Klein, writing for the majority, held that the correct analysis did not, strictly, involve the state's choice of law rules, and that the statute would apply in all cases otherwise governed by foreign law. *BDO Seidman*, 802 So.2d at 369. Judge Gross concurred, but wrote separately to point out that even under a choice of law analysis the statute would apply: "because the offer of judgment statute is 'procedural' under Florida choice of law terminology: it is part of the machinery of Florida's judicial process that promotes judicial economy." *Id.* at 370.

(b) The Effect of Majority Appellate Decisions in Florida:

The concurrence of two out of a panel of three judges constitutes the decision of a Florida District

Court of Appeal. Fla. R. Jud. Admin. 2.040 (a) (1).[1] The opinion of a dissenter has no precedential effect. See, e.g., *Bauer v. State*, 528 So.2d 6, 11 (Fla. 2d DCA 1988). The concurrence of Judges Klein and Gross in *BDO Seidman*, therefore, constituted the decision of the court.

(c) *Stare Decisis* in Florida:

Florida's District Courts of Appeal are not intermediate courts and their decisions are, in most cases, final and absolute. See, e.g., *Ansin v. Thurston*, 101 So.2d 808, 810 (Fla. 1958); *Johns v. Wainwright*, 253 So.2d 873, 874 (Fla. 1971). As the Florida Supreme Court has stated:

> ". . . the decisions of the district courts of appeal represent the law of Florida unless and until they are overruled by this Court." *Stanfill v. State*, 384 So.2d 141, 143 (Fla. 1980). Thus, in the absence of inter-district conflict, district court decisions bind all Florida trial courts. *Weiman v. McHaffie*, 470 So.2d 682, 684 (Fla. 1985).

Pardo v. State, 596 So.2d 665, 667 (Fla. 1992).

(d) *BDO Seidman* as governing Florida law:

The Florida Supreme Court declined to review the Fourth District's decision on September 24, 2002. *British Car Auctions, Inc., v. BDO Seidman, L.L.P.*, 828 So.2d 384 (Fla. 2002). The Fourth District's decision

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[1] "Three judges shall constitute a panel for and shall consider each case, and the concurrence of a majority of the panel shall be necessary to a decision." Fla. R. Jud. Admin. 2.040 (a) (1).

in *BDO Seidman* is therefore final and represented the current law in Florida as to the application of Fla. Stat. § 768.79 in cases otherwise governed by foreign law at the time of the Eleventh Circuit's decision. Indeed, Florida's Fifth District Court of Appeal has now expressly approved and followed the Fourth District's decision in *BDO Seidman*. See *Bennett v. Morales*, 2003 Fla. App. LEXIS 3790 * 4 (Fla. 5th DCA 2003)(stating that ". . . section 768.79 applies to all civil actions for damages brought in Florida, even where the substantive law of another jurisdiction is applied"). See also, *Pastor v. Union Cent. Life. Ins. Co.*, 184 F.Supp. 2d 1301, 1307 (S.D. Fla. 2002)(following the logic of *BDO Seidman* in determining the application of Fla. Stat. § 624.155 in a diversity action).

(e) The Eleventh Circuit's Application of *BDO Seidman*:

The issue before the Eleventh Circuit was whether the United States District Court for the Southern District of Florida should have applied Florida's Offer of Judgment Statute, Fla. Stat. § 768.79, in a case where Florida's choice-of-law rules mandated that the substantive law of another state governed the underlying claim. *BDO Seidman* stated that in such circumstances the statute should be applied. There was no contrary Florida Supreme Court decision. There was no contrary Florida District Court of Appeals decision. *BDO Seidman* was therefore governing. See, *Galindo v. ARI Mut. Ins. Co.*, 203 F.3d 771, 775 (11th Cir. 2000); *Pardo v. State*, 596 So.2d 665, 667 (Fla. 1992). In diversity cases, the courts of the United States are to apply the substantive laws of the forum state. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). That is what the Eleventh Circuit did.

2.

There is no conflict between the decision of the Eleventh Circuit in this case and that of the Tenth Circuit in *Boyd Rosene and Associates v. Kansas Municipal Gas Agency*, 123 F.3d 1351 (10th Cir. 1997).

In diversity cases, the courts of the United States are to apply the substantive laws of the forum state. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). The choice-of-law rules of the forum state are a part of that substantive law and may not be ignored. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496-97 (1941). This, though, is not to say that a federal court *must* follow a choice-of-law analysis when the state court would not do so. The federal objective is to ensure that two courthouses on the same block, one State and one federal, follow the same rules and reach the same result on any given set of facts. See, *e.g. Day & Zimmermann, Inc. v. Challoner et al.*, 423 U.S. 3, 5 (1975). That uniformity is necessary. These precepts, though, recognize that federal courts in different states, applying the laws of those different States, will follow different analyses and reach different results on similar legal questions. That lack of uniformity is natural and expected.

In reaching its decision in *Boyd Rosene and Associates v. Kansas Municipal Gas Agency*, 123 F.3d 1351 (10th Cir. 1997), the Tenth Circuit followed the analysis mandated by the forum state of Oklahoma. In the present case, the Eleventh Circuit followed the analysis mandated by the forum state of Florida. Any difference in result is merely the consequence of the fact that federal courts considering two, different, attorneys'

fees statutes, in two different, diversity cases, were bound to follow the two, different analyses mandated by the laws of the two, different, forum states. There is no "split" between the two Circuits as to the precepts of the *federal* law controlling the analysis.

CONCLUSION

For all the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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